In the Supreme Court of the United States

OCTOBER TERM, 1958

NO. —

UNITED STATES OF AMERICA, APPELLANT

v.

EVETTS HALEY, JR.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (Appendix A, *infra*, pp. 7–19) is reported in 166 F. Supp. 336.

JURISDICTION

This suit was instituted under Section 376 of the Agricultural Adjustment Act of 1938, as amended, 7 U. S. C. 1376, to collect civil penalties on the defendant's farm marketing excess of wheat with respect to the 1956 marketing year. The judgment of the district court (Appendix B, *infra*, p. 20) was entered on October 17, 1958, and the notice of appeal was filed on November 13, 1958. The jurisdiction of this Court to review by direct appeal the judgment entered in this cause is conferred by 28 U. S. C. 1252.

Reid v. *Covert*, 351 U. S. 487, 489; *Fleming* v. *Rhodes*, 331 U. S. 100, 102–104.

STATUTE INVOLVED

The relevant provisions of the Agricultural Adjustment Act of 1938, 7 U. S. C. 1281, *et seq.*, as amended and supplemented, are set forth in Appendix C, *infra*, pp. 23–24.

QUESTION PRESENTED

Whether the civil penalty imposed by the Agricultural Adjustment Act of 1938 for wheat produced in excess of a farm's wheat acreage allotment is, as applied to wheat wholly consumed on the farm, within the commerce power of Congress.

STATEMENT

The defendant, who operates a farm in Oklahoma, was notified by the County Committee authorized to administer marketing quotas for wheat under the provisions of the Agricultural Adjustment Act of 1938 that his farm wheat acreage allotment for 1956 was 0 acres, that his excess acreage of wheat was 43 acres, and that his farm marketing excess—upon which a civil penalty applies—was 473 bushels. Following defendant's refusal to pay the penalty of $506.11 thus incurred, the United States brought the present action to recover this penalty. Defendant alleged, by way of affirmative defenses, that the Agricultural Adjustment Act of 1938 is unconstitutional and that conditions precedent to valid establishment of a wheat acreage allotment for defendant's farm had not been complied with. At the trial, defendant's evidence did not controvert the complaint's factual allegations, but

defendant testified that he had used all of his farm-marketing-excess wheat as feed for livestock subsequently marketed in the State of Oklahoma (Tr. 108–112).

The district court ruled only on the constitutional question raised by defendant. It held that the Commerce Clause does not empower Congress to regulate production of wheat which is used as feed on the farm and that the defendant was therefore entitled to judgment.

THE QUESTION IS SUBSTANTIAL

The district court's decision is squarely contrary to *Wickard* v. *Filburn*, 317 U. S. 111, which held that the provisions of the Agricultural Adjustment Act of 1938 imposing civil penalties on the farm marketing excess of wheat are within the power of Congress under the Commerce Clause even though the wheat is wholly consumed on the farm. The Court there noted that the penalties imposed on wheat produced on excess acreage "do not depend upon whether any part of the wheat, either within or without the quota, is sold or intended to be sold", and that the quota fixed by the Act includes "all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty, or except it is stored as required by the Act or delivered to the Secretary of Agriculture." 317 U. S. at 119.

In sustaining the constitutionality of this exercise of power, the Court held: Congress, under the power conferred upon it to regulate interstate commerce,

may regulate a local activity "if it exerts a substantial economic effect on interstate commerce * * *." *Id.*, at 125. One of the primary purposes of the Act is to increase the market price of wheat, "and to that end to limit the volume thereof that could affect the market." *Id.*, at 128. Consumption on the farm has "a substantial influence on price and market conditions" because wheat so used supplies a need "which would otherwise be reflected by purchases in the open market." *Ibid.* The fact that the production of a particular farmer "may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.*, at 127–128.

The unanimous decision in *Wickard* v. *Filburn* has not since been questioned or qualified by this Court. On the contrary, in *Maneja* v. *Waialua Agricultural Co.*, 349 U. S. 254, 258–259, which involved the exemption of agricultural employees incorporated in the Fair Labor Standards Act, the Court said that it was unanimously of the view, as decided in *Filburn*, that "regulation of agriculture was within the commerce power" of Congress. And, in reliance upon *Filburn*, the courts of appeals of four circuits have rejected the contention that the farm-marketing-excess provisions of the Agricultural Adjustment Act of 1938 are not within federal commerce power.[1]

[1] *Donaldson* v. *United States*, 258 F. 2d 591, 592 (C. A. 6); *United States* v. *Kissinger*, 250 F. 2d 940, 942 (C. A. 3), certiorari denied, 356 U. S. 958; *United States* v. *Stangland*, 242 F. 2d 843, 847–848 (C. A. 7); *United States* v. *Mumma*, 237

CONCLUSION

The decision below holds unconstitutional essential provisions of an important federal statute, in direct conflict with settled holdings of this Court. The ruling below is so clearly erroneous as not to warrant further briefs or oral argument. On the authority of *Wickard* v. *Filburn* and *Maneja* v. *Waialua Agricultural Co., supra,* summary reversal of the district court's judgment would be appropriate, with remand of the cause to the district court for such further proceedings as may be necessary to determine all questions, other than constitutionality of the statute, which are in issue.

Respectfully submitted.

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DECEMBER 1958.

F. 2d 795, 796 (C. A. 3), certiorari denied, 352 U. S. 1003; *Shafer* v. *United States*, 229 F. 2d 124, 129 (C. A. 4), certiorari denied, 351 U. S. 931.

APPENDIX A

In the District Court of the United States for the Northern District of Texas, Dallas Division

No. 7077

UNITED STATES OF AMERICA

v.

EVETTS HALEY, JR.

September 10, 1958

The COURT. Gentlemen, we were inclined to withhold our opinion and reduce it to writing. We doubt, however, if we can say what we want to say or what we believe any better in writing than we can say from the bench.

This case, in so far as dollars and cents are concerned, is of small moment, but it involves a question that affects millions of our citizenship. The whole agricultural industry of the nation is affected by this decision, if the Court sustains, or if the Court refuses. In other words, the ultimate decision and the ultimate action of our Government on the question here involved will determine the future of the agricultural population to a very large degree.

In this case the defendant has been sued, we might say prosecuted, for planting wheat. For planting wheat and for harvesting it and feeding it to his stock, the allegation is that he has, within the bounds of the Constitution, violated the Agricultural Act and is due to be penalized, in the sight of the law.

There is such a thing as allowing a time-honored practice, sentiment and feeling to go on for ages until it becomes part of the warp and woof of the people themselves.

Nineteen hundred years ago a man uttered these words, "I have a right to do as I will with mine own," and for nineteen hundred years that has been one of the pillars and fundamental belief and faith of our people.

You may scoff at the idea of Christian civilization, if you wish. You will find it expressed in 46 of the 48 Constitutions of the states of the Union; you will find it expressed in words like this, "Humbly invoking the help of Almighty God we do now ordain and establish this Constitution."

We have a people in favor of constitutional government. And on that supposition we have lived, starting with the declaration, "I have a right to do as I will with my own."

I had never heard that questioned until about 1941 when one of our leading economists who was widely accepted at that time gave out a statement that when the World War was over we would not return to the former days of free enterprise and freedom of activity that we formerly had and enjoyed in the days of our fathers because, "We are now entering into a managerial revolution." It was discussed among the lawyers at the Bar meeting. I couldn't conceive of its really coming into effect, but when we hear the evidence in this case, when we hear the testimony of Mr. Benson, we realize that the managerial revolution is, in fact, here. A man cannot longer do as he pleases with his own.

We might, in addition, look to the father of free government, the father of Democracy, Thomas Jefferson, "Let every man, with the gift that God has given

you, work out your own fortunes with a just government." A little further he said, "The government that governs least governs best."

And in our own generation a great jurist, Judge Brandeis, of the United States Supreme Court, says that the inalienable right of man is to be let alone. Man in his efforts to make his fortune has a right to be let alone, unless he is interfering with somebody else.

Now, the law has been attacked by counsel for the defendant. It has been sustained by our higher courts. I hardly think, however, that the court that sustained this law had before it the record that has been made here, with its direful effect upon the public. They probably had no information of what the ballot was that was submitted to the farmers. And if you take into consideration that when this balloting takes place the farmer is made to know that he has a guarantee of a certain price if he cooperates and none if he does not. Suppose a different ballot, worded thus: "Do you as a farmer, favor the government supervision of production?" Then could you forecast the result? It is not a question of marketing; it is a question of whether production is unlawful and in violation of the Constitution.

There are some eighteen different things that the Constitution says Congress may or may not do. We might just casually look at some of those: It has a right to borrow money; a right to regulate commerce; make a treaty with foreign nations; a right to coin money; a right to establish post offices; a right to constitute inferior tribunals of the Supreme Court; a right to declare war, and provide maintenance to the navy, and in all about eighteen.

There is nothing in there that says Congress shall have the power to regulate production in agriculture. There is nothing in there that says you may levy an

income tax. There is nothing in there that says you might enact national prohibition, but we did enact a constitutional amendment for each and did enact a law of national prohibition and one for income tax. We have as yet no constitutional amendment authorizing either the Congress or the Secretary of Agriculture, or the Department of Agriculture to tell the farmer what he may plant and what he may do in his farm work.

When the Constitution was adopted many objections were urged because there was not a Bill of Rights.

North Carolina adopted a most excellent Bill of Rights; Virginia adopted one not quite so lengthy; so did Rhode Island and others. Then it was referred to Congress and James Madison worked those things over and reported them and it was submitted to the people and ten of them were adopted. So they became immediately a part of the Constitution of the United States.

The Tenth Amendment says: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Now, it is said the Constitution authorized this law. If it authorizes it under anything it is under the 8th sub-section of Article I which deals with commerce among the states. It is sub-section 3 of Sec. 8—to regulate commerce with foreign nations and among the several states and with the Indian tribes.

So this legislation we now have before us is sought to be made constitutional under that provision.

Therefore, we are relegated immediately back to the word "commerce." Production is not commerce. It has been held in the years gone by, by our courts and it appears in almost every dictionary you consult, that production is not commerce. It may pass into

commerce, but it is not commerce until it does. I am not changing my views; I am adhering to decisions I have heretofore rendered.

On one occasion we were called upon to determine whether the cotton that the cotton farmer still owned was in commerce; he put it in a warehouse and he hadn't sold it. We held it was not in commerce, and was not until he sold it. The fact that it is production that could go into commerce is only a possibility and a contingency.

One of our former justices of the United States Court, Judge White who was Chief Justice about the time some of you older men were born, lived in Louisiana, and was one of the most eminent justices of our nation, says in the case of Hooper against California: "If the power to regulate interstate commerce applied to all incidents to which said commerce might give rise, and to all contracts which might be made in the course of its transactions, that power would embrace the entire sphere of mercantile transactions in every way connected with trade between the states, would exclude the states' control over many contracts that are purely domestic in nature." 155 U. S. 648-655. The Hooper case.

If this law is finally upheld, I think it should be definitely stated by our courts that intrastate commerce has been abolished and that the states have no control over even their domestic commerce.

Now, out of sixty million acres of land planted in wheat this defendant planted forty. I won't take a pencil and see what percentage it would be, but it would be a very small percentage. Well, you say it is small but we notice it because it is the fa[illegible]eaching principle involved. If it is unlawful for him to produce something on his 40 acres that *might* get into interstate commerce, then if a woman goes into her garden and gathers a gallon of beans, or, if it is red beans and a farmer gathers them out of his field and

consumes them on his table maybe he has done something that affects commerce because if he hadn't raised them and hadn't eaten them he might have bought them from the trade and therefore someone in New Mexico would have sold him a gallon of beans, because these things *could* enter into interstate commerce. Let this be established so clearly that we and the members of the Congress will know that there is no such thing as intrastate commerce any more.

Now, I am not going to base this decision solely on this point because if there can be a definite decision of an issue or controversy between men without denouncing any act as unconstitutional it is better to put it on the other paragraph where one is present.

I am going to notice now for a moment the tendency of doing things under the so-called General Welfare Clause of the Constitution.

In Curtis' Constitutional History, written a little over a century ago under the auspices of Daniel Webster, who was one of the great constitutional lawyers of the land, he definitely stated, as contended by counsel today, that the General Welfare Clause was not an affirmative provision of the Constitution authorizing any act whatever. What is the general welfare? I would daresay that the 30 tyrants of Athens thought they were acting in the general welfare of Athens.

I would daresay that the Imperial Caesars at times at least thought they, too, were acting for the general welfare.

General welfare is what we think it is and if you are doing what you believe to be the best, then you may be doing it for the general welfare. If we adopt general welfare as part of the Constitution authorizing us to act on laws we do away with the Bill of Rights. If you pass a law prohibiting the freedom of the press, and can get a judge to hold that it is in the interest of the general welfare, what be-

comes of that limitation in the Constitution? If you pass a law doing away with freedom of religion, and you can get a judge to hold that it is in the interest of general welfare, what becomes of that guarantee of the Constitution?

General welfare has no place as an affirmative part of the Constitution, any more than if we had said when we adopted the Constitution that the good of the people shall be one of the moving purposes of the Congress.

When everything moves well, when the law is enforced and people prosper we have general welfare, and that is what the Constitution was talking about.

Not only does Mr. Curtis in his History of the Constitution say it, but so does Mr. Norton in a more modern treatment of the Constitution.

President Monroe takes the same view; so does Andrew Jackson.

The General Welfare Clause of the Constitution is not an affirmative part of the Constitution, and if it is then all of the balance of the document has gone by the board and we have a government of men and not a government of law.

Coming now, then, to a third proposition: The government has not made a case against this defendant. It has charged him with violating the Agricultural Marketing Act. Take all of the exhibits that have been offered here, and what are they called? Marketing acts, they are not production acts. All he has violated is the rule against production. He marketed nothing; he sold nothing. He produced something and he fed it to his own livestock. As Justice White said, it might enter interstate commerce, but no one knows that the cows that ate the wheat entered interstate commerce. That which is produced is not commerce. No, not until it is made such.

What is commerce? Take your best text on the subject. We have copied one here: "Commerce strictly consists in the intercourse, including the terms and negotiations and transportation, like the transit of property and persons, as well as the purchase and the sale and the barter of commodities," citing In Re Green, 52 Fed. 112, and other authorities.

Has this man had anything to do with commerce? Only in production. You have to extend the law to production in order to administer any punishment in this case.

> "* * * But congress certainly has not the power or authority under the commerce clause, or any other provision of the constitution, to limit and restrict the right of corporations created by the states, or the citizens of the states, in the acquisition, control, and disposition of property. Neither can congress regulate or prescribe the price or prices at which such property, or the products thereof, shall be sold by the owner or owners, whether corporations or individuals. * * * Commerce among the states, within the exclusive regulating power of congress, 'consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities.'" 52 F. 112, 113.
>
> "* * * The word 'commerce', as used in the statute and under the terms of the constitution, has, however, a broader meaning than the word 'trade.' Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. County of Mobile v. Kimball, 102 U. S. (697), 702." 62 F. 841.

Moreover, a subject that was not discussed appealed to me. The farmer Clements who lived next to the defendant testified that defendant did plant wheat. He also testified that he had a farm and could plant 15 acres of wheat. "What do you plow with?" "With a tractor that cost $1,000; with a distributor that cost $750.00; with a reaper that cost $950.00," and what has he got to pay it back with? The profit of 15 acres of wheat.

We asked the first witness that testified in the case, Mr. Rainwater, "Can a man support his family, pay for his equipment and own a farm under such regulations?" And I might say to the credit of the witness he agreed he could not, and the results are abundantly shown that he cannot. Just take the country over, in 1940 there was a census taken. In 1950 there was another census taken. This farm is in Oklahoma. Those farms have reduced in number considering that ten years, the population in the whole state of Oklahoma has decreased during those ten years by 4 per cent. Arkansas decreased nearly as much, North Dakota almost as much. Mississippi farm population decreased, and most of the agricultural states were able to hold their own by having some large industrial cities within their boundaries.

Not only with the other states, but let us come close to home. Let us walk over the line into Kaufman County, and what happens in Kaufman County, Texas? Between 1940 and 1950 the farm population decreased from 26,000 to 16,000.

Well, go back to Red River and Lamar County. In 1940 the farm population was 31,000 and in 1950 it was 21,000. The farmers were gone.

In Navarro County the farm population in 1940 to 1950 shrank from 20,000 to 16,000.

In east Texas, the old settlement of Nacogdoches

shrank in that ten years from 27,000 down to 17,000. Cass County shrank from 33,000 down to 22,000.

It was offered in evidence here something on the trend since 1950, during the last seven years. This is compiled on the Texas farm population by the Texas Agricultural Experiment Station, at A & M College. According to estimate, based on a statewide survey conducted by the State Agricultural Experiment Station and the Agricultural Marketing Service of the United States Department of Agriculture, 1,018,000 people were living on farms in 1957. Just seven years previous the farm population was 1,387,000. Thus the number of farm residents has decreased by 369,000 during seven years, or a decrease of 26 per cent-plus in these years. This in addition to loss between 1940 and 1950.

I can understand the vision that was in the mind of Goldsmith when he said:

> Ill fares the land where hastening ills prey:
> Where wealth accumulates and men decay.
> Princesses and lords may flourish or may fade,
> A breath may make them, a breath has made,
> But a bold yeomanry, a country's pride,
> When once destroyed can never be supplied.

Public policy—while not the intent of the Congress, the Agriculture Department has so construed its powers it has created a practice which is against public policy and is unlawful. A public policy which is injurious to the entire people is unlawful. You cannot perform a greater injury to the American citizenship than to destroy even in part the agricultural population.

Whichever way you may look the young man is not behind the plow. Before the regimentation of agriculture started he was, but now he can find better fields in industry, and the man that operates the farm

has trouble in getting labor; he has to take the old man that industry won't use.

View it in another way; view it as Jefferson did when he advocated public education. He knew, as everybody knew, that when one man was to be taxed to educate another man's child, it was a socialistic idea, but it was justified, according to Jefferson, because it would insure the perpetuity of free government by reason of an intelligent suffrage; therefore, he felt it would be justified.

I sat at one time a few years ago with a very learned judge at a dinner table, and I regard him as out of the greatest jurists that ever graced the American bench. He asked me this question—he was discussing matters pertaining in part to elections, and he said, "We have a bloc who has one spokesman and that spokesman can cast 250,000 votes in the state, and that man can go to the headquarters of one political party and say, 'If we give you our 250,000 votes how many members of the Legislature will you give us?', or 'How many seats in Congress will you give us?', or 'How many contracts with profit in them may we have?', and after making the best bargain he can, then he goes over to the next one to get them to raise the ante, and when he has peddled his 250,000 votes back and forth the public pays for the transaction."

The more blocs, the more groups that can be voted, the greater danger to the nation. The most independent thinking group that America has ever had has been the middle class of American farmers.

We learn from the evidence in this case that the upper group of farmers, those who are able to farm on a large scale, will survive, but the middle class and the lower class are selling their farms and going away.

I am thinking about an old school history, of another nation, the great civilization of France:

> "* * * peace prevailed; justice was impartially administered; industry flourished; the taxes were light; the towns practically possessed self-government; agriculture improved; * * *
>
> "But this age of prosperity was not to last * * *
>
> "* * * The small farms were one by one bought up by wealthy men, who converted them into extensive cattle and sheep pastures tended by a few slaves. Thus the independent peasant population was gradually driven off the land, and agriculture declined * * *" The Leading Facts of French History by D. H. Montgomery, page 14.
>
> "The law, in fact, regulated everything. A man could not set a price on his own goods; the government did it for him. These oppressions destroyed all public spirit and desire for life." Montgomery's History of France, page 16.

I consider the interpretation of the Act given by the Department of Agriculture as being against public policy and as destructive of a great branch of our civilization, the agricultural branch.

In many places more than half of them have been driven from their homes and their houses are vacant. Start here and drive through Denton County, and then down through Ellis County and back to Hunt County, and those prosperous blackland counties, and go down through Kaufman County, and get off of the highways and see how many vacant houses there are. We wonder where all the people in the cities come from, but if you will go out there you will stop wondering. Fully half of the population of the rural districts are now residing in the cities.

All of this shows that the regimentation of the farm

and this managerial revolution and these practices which prevail are bad, and our Congress would do well to read the testimony of Mr. Benson; they would do well to read the record that has been made in this case, and then they should ask themselves if it is their purpose and their intention to wipe out entirely that provision of the Constitution that draws a distinction between interstate commerce and intrastate commerce, and to say that everything in the way of production is also commerce.

This man's only violation of any rule has been the violation of production and not of commerce. He has marketed nothing; he has sold nothing, and he has entered no where into the marts of commerce.

We will enter a judgment in favor of the defendant.

T. WHITFIELD DAVIDSON,
Judge.

APPENDIX B

In the United States District Court for the Northern District of Texas, Dallas Division

Civil No. 7077

UNITED STATES OF AMERICA, PLAINTIFF

v.

EVETTS HALEY, JR., DEFENDANT

Judgment

On the 8th day of September, A. D. 1958, came on for trial before the Court, sitting without a jury, the above entitled and numbered cause and came the plaintiff and the defendant by their attorneys and announced ready. The Court having heard the pleadings, the evidence and arguments of counsel, and being fully advised in the premises, on the 9th day of September 1958 rendered an oral opinion containing findings of fact and conclusions of law and found and concluded that the law and the facts are with the defendant and against the plaintiff and that the plaintiff should take nothing by its suit; it is, therefore,

ORDERED, ADJUDGED AND DECREED that the plaintiff, United States of America, take nothing by its suit against the defendant, Evetts Haley, Jr., and that the costs of this action be and the same are hereby taxed against the plaintiff,

To all of which action of the Court plaintiff excepts.

DATED at Dallas, Texas, this 17th day of October, 1958.

(s) T. WHITFIELD DAVIDSON,
United States District Judge.

APPENDIX C

The Agricultural Adjustment Act of 1938, as amended and supplemented, provides in part as follows:

SEC. 301 (b). For the purposes of this Act—

* * * * *

(6) (A) "Market", in the case of corn, cotton, rice, tobacco, and wheat, means to dispose of, in raw or processed form, by voluntary or involuntary sale, barter, or exchange, or by gift inter vivos, and, in the case of corn and wheat, by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of, but does not include disposing of any of such commodities as premium to the Federal Crop Insurance Corporation under the Federal Crop Insurance Act.

(B) "Marketed", "marketing", and "for market" shall have corresponding meanings to the term "market" in the connection in which they are used. [7 U. S. C. 1301 (b) (6) (A)-(B).]

* * * * *

Notwithstanding the other provisions of this chapter—

(1) The farm marketing quota under this chapter for any crop of wheat shall be the actual production of the acreage planted to wheat on the farm, less the normal production or the actual production, whichever is the smaller, of that acreage planted to wheat on the farm which is in excess of the farm acreage allotment for wheat.

The normal production, or the actual production, whichever is the smaller, of such excess acreage is hereinafter called the "farm marketing excess" of wheat. For the purposes

of this section, "actual production" of any number of acres of wheat on a farm means the actual average yield of wheat for the farm times such number of acres.

(2) During any marketing year for which quotas are in effect, the producer shall be subject to a penalty on the farm marketing excess of wheat. The rate of the penalty on wheat shall be 45 per centum of the parity price per bushel of wheat as of May 1 of the calendar year in which the crop is harvested.

(3) The farm marketing excess for wheat shall be regarded as available for marketing, and the penalty and the storage amount or amounts to be delivered to the Secretary of the commodity shall be computed upon the normal production of the excess acreage. Where, upon the application of the producer for an adjustment of penalty or of storage, it is shown to the satisfaction of the Secretary that the actual production of the excess acreage is less than the normal production thereof, the difference between the amount of the penalty or storage as computed upon the basis of normal production and as computed upon the basis of actual production shall be returned to or allowed the producer. The Secretary shall issue regulations under which the farm marketing excess of the commodity for the farm may be stored or delivered to him. Upon failure to store or deliver to the Secretary the farm marketing excess within such time as may be determined under regulations prescribed by the Secretary, the penalty computed as aforesaid shall be paid by the producer. Any wheat delivered to the Secretary hereunder shall become the property of the United States and shall be disposed of by the Secretary for relief purposes in the United States or in foreign countries or in such other manner as he shall determine will divert it from the normal channels of trade and commerce. [7 U. S. C. (Supp. V) 1340 (1)–(3).]

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No. 587

In the

Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA,
Appellant,

v.

EVETTS HALEY, JR.,
Appellee.

On Appeal from the United States District Court for the Northern District of Texas

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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No. 587

In the

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OCTOBER TERM, 1958

UNITED STATES OF AMERICA,

Appellant,

v.

EVETTS HALEY, JR.,

Appellee.

On Appeal from the United States District Court for the Northern District of Texas

MOTION TO DISMISS OR AFFIRM

STATEMENT OPPOSING JURISDICTION

Appellee submits that this Court is without Jurisdiction to review this cause on Direct Appeal from the District Court; the prerequisite to a direct appeal to this Court under Title 28 U. S. C. Section 1252, relied upon by Appellant to give this Court Jurisdiction, to wit: "a *judgment, decree or order* * * * holding an Act of Congress unconstitutional", is wholly absent from the *Judgment* appealed from.

The adjudication clause of said *Judgment* adjudges that "the plaintiff, United States of America, take nothing by its suit against the defendant, Evetts Haley, Jr., and that the costs of this action be and the same are hereby taxed against the plaintiff,". (Jurisdictional Statement, Appendix B, Page 21.) Neither the Constitution of the United States, nor any Act of Congress is mentioned in the *Judgment* appealed from.

Appellee submits that this Court is without authority to extend its Appeliate Jurisdiction beyond the limits fixed by Statute.

No "Civil Penalty" Being Involved in This Action, No Substantial Question is Presented.

The question presented (JS-2) by Appellant is stated to be: "Whether the *civil* penalty imposed by the Agricultural Adjustment Act of 1938 for wheat produced in excess of a farm's wheat acreage allotment is, as applied to wheat wholly consumed on the farm, within the commerce power of Congress."

The Appellant, United States of America, established the Agricultural Adjustment Act of 1938 as a *penal* statute, to deprive a California State Court of Jurisdiction in the case *of Western Fruit Growers v. United States in 1941 (124 Fed. 2d 381 at pages 386 and 387)*. The action brought by Appellant sought to recover a penalty imposed by the same "penal statute." The penalty cannot be "criminal" or "penal" in California, to deprive a State Court of Jurisdiction, and "civil" in Texas, when attempted to be col-

lected from a farmer. No "civil penalty" being involved in the case, Appellee submits that no substantial question is presented.

Appellant's Proof that the Penalty was Assessed and Fixed Against Wheat Standing in the Field Upon "the Date of Destruction" Eliminated the Question of "Consumption" from the Case.

The Appellant's "Question Presented' (supra) is expressly limited to "wheat wholly consumed on the farm." The Appellant, having alleged and proved that the penalty became affixed and was assessed when the wheat was standing in the field upon the "date of destruction" (Transcript of Proceedings, Pages 90, 91), the question of consumption becomes moot and academic to the issues in the case.

Appellee submits that an academic question is not a substantial question, nor is a question, wholly unrelated to the Judgment appealed from, a substantial question.

The District Court's Rendition of Judgment in Favor of the Defendant Upon the Ground that "the Government Has Not Made a Case Against This Defendant" Gives Rise to No Substantial Constitutional Question.

This Court's attention is directed to the language of the opinion below by District Judge T. Whitfield Davidson (Jurisdictional Statement, Pages 13, 14 and 18):

> "The Government has not made a case against this defendant. It has charged him with violating the Agri-

cultural Marketing Act. Take all of the exhibits that have been offered here, and what are they called? Marketing acts, they are not production acts. All he has violated is the rule against production. He marketed nothing; he sold nothing. He produced something and he fed it to his own livestock. As Justice White said, it might enter interstate commerce, but no one knows that the cows that ate the wheat entered interstate commerce. That which is produced is not commerce. No, not until it is made such." (Page 13.)

"Has this man anything to do with commerce? Only in production. You have to extend the law to production in order to administer any punishment in this case." (Page 14.)

"I consider the interpretation of the Act given by the Department of Agriculture as being against public policy and as destructive of a great branch of our civilization, the agricultural branch." (Page 18.)

An analysis of the foregoing quotation from the Court's opinion, shows that his finding of fact was that the act sought to be penalized was "*Production*"; that the penalty sought to be imposed was a *marketing* penalty; and that his finding of law, based on these facts, was that the interpretation given to the Act, by the Department of Agriculture, was illegal. It is not a holding that the Act is unconstitutional, but that the *interpretation and administration* thereof is illegal. It is also a flat repudiation of the Congressional attempt to augment the powers granted to Congress by the Constitution, through the simple expedient of redefining the meaning of a word, "marketing," as used in the common speech of the people of the United States. The trial Court, in holding that production was a subject reserved to the States and the People under the Tenth

Amendment, applied to the Constitution the rule of construction of statutes as stated by Justice Frankfurter: "And so we assume that Congress uses words in their popular meaning, as used in the common speech of men." (47 Col. L. R. 527, 536.)

The Court found as a fact that the Department of Agriculture was trying to impose a penalty upon production. His conclusion of law was that the Constitution does not say that "Congress shall have the power to regulate production in agriculture." By virtue of these findings that only "production" is here involved, whether Congress has power under the Commerce Clause to regulate "consumption" of wheat is not a substantial question reviewable by this Court on direct appeal.

The Judgment Having Found For the Defendant on the "Law and the Facts", One Alleged Error as Presented in the Question on Appeal Will Not Raise a Substantial Question for Review by This Court when the Case Involved Multiple Issues of Law and Fact.

No formal request for amended findings of fact or conclusions of law were made to the District Court upon trial of the instant case. The Defendant by way of defense questioned the Constitutionality of the Agricultural Adjustment Act of 1938, as Amended, alleging violation of the Constitution in eleven respects, as follows:

1. Article I, §7—an invalid attempt to impose a criminal penalty by Congressional Resolution, rather than law;

2. Article I, §8(1)—an invalid authorization of the expenditure of public funds for private rather than public benefit;

3. Article I, §8(3)—an attempted illegal exercise of power under the commerce clause;

4. Article I, §8(18)—an invalid attempt to regulate agricultural production within a State;

5. Article I, §9(4)—an invalid imposition of a direct tax upon a portion of the people;

6. Article I, §9(5)—an invalid imposition of a tax on exports from the several States;

7. Amendment IV—an invalid provision for illegal seizure;

8. Amendment V—invalid seizure of property for private use without due process or just compensation;

9. Amendment VI—invalid as an imposition of criminal punishment without provision for jury trial;

10. Article I, §9(3)—invalid as an attempted expropriation of private property by retroactive law;

11. Article I, §8—invalid as lacking in uniformity and universality.

The Defendant further resisted the action on the ground that implementation of the farm marketing quotas of the Act was an unconstitutional exercise of non-existing authority when the calculated national acreage allotment was below the statutory minimum.

In addition Defendant contested by allegation and proof the performance of six (6) conditions precedent to the imposition of the penalty sought to be collected.

Appellee submits that the District Court's adjudication that the law and facts were with the Defendant is equivalent to sustaining the Defendant's contentions on all issues.

Such an adjudication, combined with Appellant's failure to request additional or different findings, and its patent failure to raise the question of possible error by presenting all material questions on the appeal, constitute a waiver of any error, in the District Court's Findings of Fact and Law as to seventeen of the legal issues involved, and acquiescence in the correctness of the Court's ruling thereon. Appellee submits that since the Judgment must be affirmed upon any ground that will support it, the question of error in one alleged ruling on one alleged issue can in no way be considered substantial. Appellant having acquiesced in all of the Court's rulings other than the one involved in the "Question Presented," if any, the Appeal should be dismissed or the Judgment of the District Court should be affirmed as rendered.

Wickard v. Filburn is Not Controlling as It Is Distinguishable on Its Facts.

Appellant states that the district court's decision is squarely contrary to *Wickard v. Filburn, 317 U. S. 111*, and concludes that summary reversal of the decision of the district court would be appropriate, with remand of the

cause to that court for such further proceedings as may be necessary to determine all questions, other than constitutionality of the statute, which are in issue. In the light of the question on appeal and the *judgment* appealed from, *Wickard v. Filburn* is readily and clearly distinguishable on its facts. The judge below, Honorable T. Whitfield Davidson, wisely observed in this connection: "I hardly think, however, that the Court that sustained this law had before it the record that has been made here, with its direful effects upon the public." (Jurisdictional Statement at page 9.)

Wickard v. Filburn held the imposition of *a* penalty, not a *civil* penalty, for the actions there involved, to be constitutional under the Commerce Clause. Here the Court, under the evidence, did not find the Act of Congress to be unconstitutional but that the Department of Agriculture "has so construed its powers it has created a *practice* which is against public policy and is unlawful." (Jurisdictional Statement at page 16.) The Court likewise observed: "I consider the *interpretation* of the Act given by the Department of Agriculture as being against public policy and as destructive of a great branch of our civilization, the agricultural branch." (Jurisdictional Statement at page 18.) The evidence herein clearly proved that defendant Haley marketed nothing, sold nothing and no where entered into the marts of commerce. (Jurisdictional Statement at page 19.)

The court below having held that defendant in *producing* a crop of wheat had not violated the Act which is actually

a *marketing* Act, the question on appeal relating to constitutionality is not substantial and the appeal should be dismissed or the decision and judgment below affirmed.

It should be noted that *Wickard v. Filburn* is also distinguishable for other substantial reasons. In instant case, Haley was afforded a full trial by the Court and all issues of fact and law were contested. The disposition of the wheat and the cattle to which it was fed was established by the evidence as being completely intrastate (Tr. at pages 108 through 112). In *Wickard v. Filburn*, "the case was submitted for decision on the pleadings and upon a stipulation of the facts" *(317 U. S. at page 114)*. It was even stipulated as to "a summary of the economics of the wheat industry" *(317 U. S. at page 125)*. Neither the disposition or the "intended disposition" of the crop of wheat there involved was known to the Court and the farmer's past practices in disposing of his wheat were stipulated *(317 U. S. at page 114)*. In instant cause, there was no testimony that Haley would have gone into the market and purchased wheat to feed his cattle had he not produced the wheat used to feed them, nor was there testimony that he would have purchased wheat rather than other suitable feed not subject to regulation under the Agricultural Adjustment Act of 1938 as amended. Hence it is not open to speculation that Haley *might* or *could* have affected interstate commerce in *wheat* in the slightest degree.

Even if the *Wickard v. Filburn* decision be regarded as controlling, it would require affirmance of the lower court.

The Court there observed: "Only when he threshed and thereby made it a part of the bulk of wheat overhanging the market did he become subject to penalty" *(317 U. S. at page 133)*. In instant cause, the government witness, Mr. Rainwater, testified without contradiction that the penalty attached on the "date of destruction" while the wheat was still standing in the field and before harvesting (Tr. at pages 90 and 91). It should be obvious that the quoted statement from *Wickard v. Filburn* would require the affirmance of the lower court if the *Wickard* decision be found applicable.

The Court in the *Wickard* decision, in discussing the question of whether the farmer had been denied due process of law, observed, "It only appears that if he could get all that the government gives and do nothing that the government asks, he would be better off than this law allows. To deny him this is not to deny him due process of law" *(317 U. S. at page 133)*. The Haley farm was in the Soil Conservation program when purchased by Haley and he *cooperated* with the Government the following year (Tr. at pages 122 and 123), but he at no time applied for nor received any payments or benefits under the law under which he is sought to be penalized (Tr. at page 114 and pages 124 through 127). It is therefore urged that *Wickard v. Filburn* is no authority insofar as due process of law to the defendant in this case is concerned, even if such decision be considered comparable to this cause.

The Decision Below Should be Affirmed on the Authority of United States v. Butler (297 U. S. 1).

To the extent that the Agricultural Adjustment Act of 1938 as amended may be construed to regulate production of wheat by defendant Haley, it is unconstitutional by authority of *United States v. Butler (297 U. S. 1)*, which decision declared invalid the Agricultural Adjustment Act of 1933. Although that case directly involved the taxing power of Congress as an incident of a plan to regulate and control agricultural production, it embraced all of the enumerated powers of Congress *including the commerce power*. The Act there involved referred to a burden upon and an obstruction of the normal currents of commerce, but did not purport to regulate transactions in interstate or foreign commerce. *(297 U. S. at page 63.)* As one of the enumerated powers, the commerce clause was embraced in the following holding by the Court: "* * *, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government." * * * "From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohib-

ited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden." *(297 U. S. at page 68.)* To hold that no power was expressly delegated to control production necessarily required the conclusion by the Court in that case that such power was not contained or reasonably implied in the commerce power. The Court further stated *(297 U. S. at page 68)*: "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted." (Citing *Child Labor Tax Case, 259 U. S. 20; Hill v. Wallace, 159 U. S. 44; Linder v. United States, 268 U. S. 5, 17; United States v. Constantine, 296 U. S. 287.)*

The Court below likewise held there was no delegated power in the Constitution whereby the Congress could control agricultural *production*. It pointed out there has been no amendment to the Constitution authorizing the Congress or the Secretary of Agriculture, or the Department of Agriculture to tell the farmer what he may plant and what he may do in his farm work. The Court below further noted that production is not commerce; it may pass into commerce but it is not commerce until it does. (Jurisdictional Statement at pages 9, 10 and 11.) Referring to the legislative finding of the Act in *7 U. S. C. A. 1331* (Appendix A at pages 15 and 16) that "It is in the interest of the general welfare that interstate and foreign commerce in wheat and its products be protected from such burdensome surpluses and distressing shortages, * * *," the Court affirms the accepted principle enunciated in the *Butler*

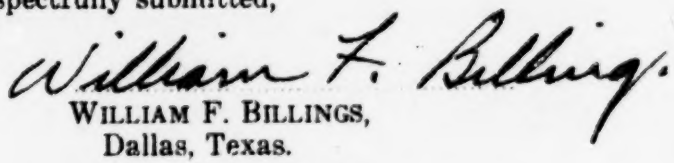
case (supra) that Congress has no independent power to provide for the general welfare. It would appear most obvious that Congress has no power to regulate production of wheat in the interest of the general welfare.

The decision below being consistent with the *Butler* case (supra) should be affirmed, or the appeal should be dismissed as no substantial question is presented.

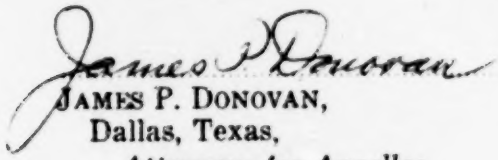
CONCLUSION

For the foregoing reasons, it is respectfully urged that the appeal be dismissed or in the alternative, the decision and judgment below be affirmed.

Respectfully submitted,



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APPENDIX A

The Agricultural Adjustment Act of 1938, as amended and supplemented, provides in part as follows:

Sec. 331. Legislative findings

Wheat is a basic source of food for the Nation, is produced throughout the United States by more than a million farmers, is sold on the country-wide market and, as wheat or flour, flows almost entirely through instrumentalities of interstate and foreign commerce from producers to consumers.

Abnormally excessive and abnormally deficient supplies of wheat on the country-wide market acutely and directly affect, burden, and obstruct interstate and foreign commerce. Abnormally excessive supplies overtax the facilities of interstate and foreign transportation, congest terminal markets and milling centers in the flow of wheat from producers to consumers, depress the price of wheat in interstate and foreign commerce, and otherwise disrupt the orderly marketing of such commodity in such commerce. Abnormally deficient supplies result in an inadequate flow of wheat and its products in interstate and foreign commerce with consequent injurious effects to the instrumentalities of such commerce and with excessive increases in the prices of wheat and its products in interstate and foreign commerce.

It is in the interest of the general welfare that interstate and foreign commerce in wheat and its products be pro-

tected from such burdensome surpluses and distressing shortages, and that a supply of wheat be maintained which is adequate to meet domestic consumption and export requirements in years of drought, flood, and other adverse conditions as well as in years of plenty, and that the soil resources of the Nation be not wasted in the production of such burdensome surpluses. Such surpluses result in disastrously low prices of wheat and other grains to wheat producers, destroy the purchasing power of grain producers for industrial products, and reduce the value of the agricultural assets supporting the national credit structure. Such shortages of wheat result in unreasonably high prices of flour and bread to consumers and loss of market outlets by wheat producers.

The conditions affecting the production and marketing of wheat are such that, without Federal assistance, farmers, individually or in cooperation, cannot effectively prevent the recurrence of such surpluses and shortages and the burdens on interstate and foreign commerce resulting therefrom, maintain normal supplies of wheat or provide for the orderly marketing thereof in interstate and foreign commerce.

The provisions of sections 331-339 of this title affording a cooperative plan to wheat producers are necessary in order to minimize recurring surpluses and shortages of wheat in interstate and foreign commerce, to provide for the maintenance of adequate reserve supplies thereof, and to provide for an adequate flow of wheat and its products

in interstate and foreign commerce. The provisions hereof for regulation of marketings by producers of wheat whenever an abnormally excessive supply of such commodity exists are necessary in order to maintain an orderly flow of wheat in interstate and foreign commerce under such conditions. Feb. 16, 1938, 3 p. m., c. 30, Title III, § 331, 52 Stat. 52.

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No. 587

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, APPELLANT

v.

EVETTS HALEY, JR.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

REPLY TO STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

J. LEE RANKIN,
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Appellee suggests (Br. 3, 10) that *Wickard* v. *Filburn,* 317 U.S. 111, does not control the issue in this case, on the ground that the penalty here involved was applied to unharvested wheat. But appellee's own admission at the trial indisputably establishes that his wheat was "harvested" with a "combine" and that the wheat was further processed and then fed to livestock on his farm, which livestock were then sold (Tr. 107–112). Accordingly, the decision in *Wickard* v. *Filburn* is squarely applicable. 317 U.S. at 127–128.

Reference to the district court's opinion (see J.S. 7) shows that the court assumed that appellee's wheat

was harvested and fed to livestock. The court then disposed of the case solely on the theory that the Agricultural Adjustment Act of 1938 is unconstitutional as here applied because wheat consumed on the farm, rather than marketed as such, is not subject to the commerce power. This theory is untenable under *Wickard* v. *Filburn*. Accordingly, summary reversal of the district court's judgment is appropriate, with remand of the cause to the district court for such further proceedings as may be necessary to determine all questions, other than constitutionality of the statute, which are in issue.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

JANUARY 1959.

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OCTOBER TERM, 1958

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Appellant,

v.

EVETTS HALEY, JR.,

Appellee.

On Appeal from the United States District Court for the Northern District of Texas

MOTION TO SET ASIDE AND VACATE THE ORDER OF THIS COURT ENTERED FEBRUARY 24, 1959, AND APPLICATION FOR AN ORDER PLACING THIS CASE ON THE CALENDAR FOR A HEARING ON THE MERITS.

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MOTION TO SET ASIDE AND VACATE THE ORDER OF THIS COURT ENTERED FEBRUARY 24, 1959, AND APPLICATION FOR AN ORDER PLACING THIS CASE ON THE CALENDAR FOR A HEARING ON THE MERITS.

The Defendant-Appellee, Evetts Haley, Jr., respectfully moves this Court for an Order Setting Aside the Per Curiam Order of this Court, entered February 24, 1959,

and directing that the case be placed upon the regular Calendar of this Court for a hearing on the merits, and in support of said Motion submits the following:

FACTS

On the 17th day of October, 1958, after a trial before the United States District Court for the Northern District of Texas, Dallas Division, said Court entered a Judgment that Plaintiff-Appellant, United States of America, take nothing by its suit against the defendant, Evetts Haley Jr. The Appellant, United States of America, gave notice of appeal and filed its Jurisdictional Statement in this Court seeking a review by direct appeal under the provisions of 28 U. S. C. 1252 (JS-1) and requesting summary reversal with remand for further proceedings to determine the questions other than constitutional questions presented. Thereafter, the Appellee duly filed a Statement Opposing Jurisdiction and a Motion to Dismiss or Affirm. Without granting the Appellee a hearing or the opportunity to fully present his case, in oral argument or otherwise, this Court summarily and arbitrarily entered the following Order on February 24, 1959: "PER CURIAM. The Judgment is reversed. *Wickard v. Filburn, 317 U. S. 111.*"

LAW AND ARGUMENT

The Summary and Arbitrary Reversal of the District Court's Judgment, Without Granting Appellee Any Hearing on the Merits is an Illegal Usurpation of

Authority by This Court in Direct Contravention of the Constitution, Statutes of the United States and This Court's Own Rules.

The United States took a *direct appeal* in this cause to the United States Supreme Court under the authority of Title 28 U. S. C. 1252. There was no application for Writ of Certiorari where jurisdiction is discretionary with this Court. Appellee has not had the benefit of a full review by an intermediate Appellate Court. His *only* Appellate Review is a review by this Court. Summary reversal upon a direct appeal without a full review shows alarming disposition to open the way to government by men instead of government by law guaranteed by our Constitution. That such was not the intention of Congress in enacting 28 U. S. C. 1252 is evidenced by the dissenting opinion of Mr. JUSTICE DOUGLAS concurred in by Mr. JUSTICE BLACK in *Linehan v. Waterfront Commission of New York Harbor, et al., 347 U. S. 439, 74 S. Ct. 623*, wherein it was written concerning *affirmation* of a District Court Judgment:

> "This case illustrates what I fear is a growing practice of the Court of diluting the Act of Congress which gives us jurisdiction of appeals. 28 U. S. C. §1253 et seq. The Congress carved out a group of cases, of which this is one, that come here as of right and is not dependent, as are petitions for certiorari, on a vote of four Justices out of nine for an adjudication by the Court of the merits of the controversy. In recent years the Court has more and more dismissed or affirmed appeals, with no opportunity of counsel to make oral argument and without any opinion by the Court.

> "If we conclude that the Compact is constitutional, we should give our reasons so that all interests will be protected. Congress expected as much in all but frivolous cases coming here by appeal."

Now these justices, and indeed the entire Court, have been silent in the face of more flagrant facts—*summary reversal* without Appellee's being granted the chance for oral argument and without an opinion *by the Court*. With seventeen points of constitutional law available to sustain the lower Court's decision and an Appeal from the ruling on only one of such points, "The Commerce Clause", the citation of *Wickard v. Filburn (317 U. S. 111)*, governs only one question presented by the record and in no way is authority for reversal without a full hearing of a decision based on different facts and different propositions of law.

This Court's Order Summarily Reversing the Judgment of the District Court Without a Hearing on the Merits is Illegal and Void Under Rule 16 of the Revised Rules of the Supreme Court of the United States.

The Court's attention is directed to the provisions of Rule 16 which is applicable to the case at bar. Said Rule contains no authorization for summary reversal of a District Court Judgment before this Court on a Direct Appeal. On the contrary, a careful reading shows that the Rule prohibits such action by the very nature of the Orders provided for therein. Certainly it contemplates determination *only* of the question of *jurisdiction* and the briefs submitted are directed to that question.

In accordance with the provisions of Rule 16, the Appellee moved under subparagraph (a) thereof to dismiss the Government's Appeal as not within the Jurisdiction of the Court and under subparagraph (c) of said Rule to affirm the District Court Judgment on the ground that it was manifest that no substantial federal question was presented.

Subparagraph (4) of Rule 16 reads in part as follows:

> "4. After consideration of the papers distributed pursuant to the foregoing paragraph, the Court will enter an appropriate order. If such order notes probable jurisdiction, or postpones consideration of the question of jurisdiction to the hearing of the case on the merits, the case shall stand for argument."

Study of this Rule shows that in the present state of the record in the case at bar, this Court was authorized to enter only one of the following Orders:

(1) an Order dismissing the Appeal for want of jurisdiction;

(2) an order affirming the Judgment of the District Court on the ground that it was manifest that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument;

(3) an Order postponing the question of jurisdiction to the hearing on the merits;

(4) an Order noting probable jurisdiction.

Appellee submits that no order, other than those mentioned above, would be an "appropriate order" as required by Rule 16.

Supreme Court Rule 17 confirms Appellee's position, as to what is an "appropriate order" within Rule 16, in the following language: "Within twenty days after the Court has entered an order noting probable jurisdiction or postponing consideration of the question of jurisdiction to the hearing on the merits, * * *."

28 U. S. C. A. 2106 empowers this Court to "reverse any judgment * * * and—remand the cause and direct the entry of such appropriate judgment * * * or require such further proceedings to be had as may be *just* under the circumstances." However, no cases found thereunder appear to give this Court power to summarily reverse on direct appeal where no hearing is afforded nor examination made of the trial court record. It seems obvious that such reversal would not be "just" as required by the Statute. This is strengthened by the general rule that every presumption in favor of the trial court's decision should be indulged.

Clearly from the foregoing Rules and Statutes, if the Court determines that it has jurisdiction, the cause must stand for argument. By reversing the District Court's decision in its Order of February 24, 1959, the Court took jurisdiction of the Appeal. Having noted probable jurisdiction, the case must under Rule 16, "stand for argument" and under Rule 17 the appellant is required to file with the Clerk a designation of the parts of the record the printing of which he thinks necessary for a consideration of the questions presented as set forth in his notice of appeal and his jurisdictional statement.

No authority has been offered to this Court to justify its Summary Reversal Order entered on February 24, 1959. It is true that the United States in its Jurisdictional Statement, prayed "On the authority of *Wickard v. Filburn* and *Maneja v. Waialau Agricultural Co.*", supra, for summary reversal of the district court's judgment. An examination of the cited cases will prove that neither is authority for a summary reversal and no other authority is offered. Historically as this Court is aware governments benign in origin tend to become despotic. It would appear that this Court would resolve every doubt in favor of a citizen opposed by the mighty array of government and provide him a hearing to air his position fully.

Only this Court has power to make Rules concerning the conduct of proceedings before it, and once those Rules are made, the Bar of the Supreme Court must rely on their meaning what they say and that the Court by judicial fiat and usurpation will not enlarge upon or vary the written language. Otherwise, a lawyer can only predict that this Court will do the unpredictable.

The following quotation from Supreme Court Rule 45 is noteworthy:

> "1. The Court looks with disfavor on the submission of cases on briefs, without oral argument, and therefore may, notwithstanding such submission, require oral argument by the parties."

The only "summary" action authorized by the Rules of this Court, other than the dismissal of an appeal of the affirmance of a judgment as provided in Rule 16, is found

in Rule 44(3) providing: "A case will be placed on the summary calendar whenever the court concludes that it is of such a character as not to justify extended argument." Even then a litigant is granted half an hour for argument.

The Appellee has not submitted the case under Rule 45 on the Briefs filed, for by the Order of Summary Reversal this Court has denied Appellee the right to file a full brief in support of the decision and Judgment of the District Court.

Appellee respectfully submits that the issues in the case at bar are of the utmost importance, not only to him as an individual, but also to all the people of the United States. The Constitution alone is the law of the land, and no one decision of this Court can decree the constitutionality of any Congressional Act except with specific reference to the facts presented in the case before it. Every citizen of the United States is entitled, within the rules of established procedure, to have his day in Court, and to have a full hearing and full consideration on the facts and the law of his particular case. Unless the material facts and law are substantially identical with those of a prior case, the decision rendered therein is not conclusive upon the issues presented. To hold otherwise would be an endorsement of the theory of "abstract" law, which theory has been repudiated by this Court and was not contemplated by the draftsmen of the Constitution of the United States.

It is not within the province of this Court to attempt to amend the Constitution of the United States by a strained

construction and "interpretation" of the words used therein. Neither is such an amendment within this Court's power through utilization of the simple expedient of denying a citizen his right to be heard, and by indirection and without expressed reason, summarily overruling and rejecting the well considered opinion of an eminent jurist, who under our established system of jurisprudence has not only the right, but the duty, to strike down any unconstitutional law or application thereof which may come to his attention.

WHEREFORE, Appellee respectfully prays this Court to set aside its Order of February 24, 1959, reversing the Judgment of the District Court entered herein, and for an Order directing that this case be placed on the general calendar of this Court and stand for argument in its assigned order.

Respectfully submitted,

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No. 587

In the

Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA,

Appellant,

v.

EVETTS HALEY, JR.,

Appellee.

On Appeal from the United States District Court for the Northern District of Texas

MOTION FOR REHEARING

Appellee, subject to final disposition of his Motion to vacate and set aside the Order of this Court entered herein on February 24, 1959, respectfully requests a Rehearing on the Entry of said Order and in support thereof shows this Court as follows:

The rules of this Court, statute and precedent establish that this Court is without jurisdiction to entertain this appeal.

The decretal section of the Judgment *appealed directly to this Court from the District Court for the Northern District of Texas* reads:

> "ORDERED, ADJUDGED AND DECREED, that the plaintiff, United States of America, take nothing by its suit against the defendant, Evetts Haley, Jr., and that the costs of this action be and the same are hereby taxed against the plaintiff," (JS at 21).

28 U. S. C. 1252 provides in part as follows:

> "Any party may appeal to the Supreme Court *from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional* in any civil action * * * to which the United States * * * is a party."

Rule 54, 28 U. S. C. A. defines a Judgment in paragraph (a):

> "Definition; Form. 'Judgment' as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings."

The difference between a Judgment and an opinion or docket entry has been recognized in the following cases.

U. S. v. Hark, opinion by Justice Roberts, *320 U. S. 531*, made this distinction:

> "Where a formal judgment is signed by the Judge this is prima facie the decision or judgment rather than a statement in an opinion or a docket entry. In recent cases we have so treated it. U. S. v. Resnick, 299 U. S. 207; U. S. v. Midstate Horticultural Company, 306 U. S. 161. * * * He (the Judge) entered a formal order of record. We are unwilling to assume that he deemed this an empty form."

In *American Insurance Co. v. Scheufler, 129 Fed. 2d 143; Appeal Dismissed 314 U. S. 575; Certiorari denied 317 U. S. 687; Rehearing denied 317 U. S. 712,* this Court's rule was stated thusly:

> "We are not concerned with the written opinion of the trial court, as the statements therein may not be used to ascertain the evidence or the facts, or to control or modify the findings of fact upon which the Judgment is based. Loeb v. Trustees of Columbia Twp., 178 U. S. 472; Stone v. United States, 164 U. S. 380."

Winkleman v. General Motors Corporation, D. C. N. Y. held in 1942, 48 Fed. Supp. 490, that the Court's decision and Judgment to be entered thereon are not the same thing under the Federal Rules of Civil Procedure, since "decision" is a part of procedure, while "Judgments" are dealt with separately, and although a "decision" in a case is the court's "judgment" thereon, it is not necessarily its Judgment therein, meaning the Judgment thereafter entered on decision. The Court's findings like a Jury's verdict have not the same effect as a Judgment.

That an appeal cannot be taken from an opinion is established upon Supreme Court authority in *Holdsworth v. United States, Me. 1950, 179 Fed. 2d 933.*

On the basis of the foregoing Authorities Appellee submits that *there is no "Judgment" in this case which holds an Act of Congress unconstitutional and that this Court has no Jurisdiction of the direct appeal from the District Court* taken herein.

The cases cited by the Appellant as basis of this Court's Jurisdiction are in no way in point. In *Reid v. Covert, 351*

U. S. 487, 489, this Court stated: "It is conceded that, in issuing the Writ of Habeas Corpus the District Court held an Act of Congress unconstitutional." Obviously the point raised here was not even involved in that case. In *Fleming v. Rhodes, 331 U. S. 100, 102-104*, the Court stated that the sole inquiry was as to the propriety of the District Court's issuing an injunction. Therefore the Appellant has offered nothing to establish jurisdiction in this Court, and Jurisdiction should be refused.

Under the rule that a direct appeal to the Supreme Court will not lie when the judgment of the District Court rests in part on grounds independent of the invalidity or construction of the statute, this Court has no jurisdiction. *(U. S. v. Hastings, 296 U. S. 188; U. S. v. Halsey Stuart & Co., 296 U. S. 451; U. S. v. Borden Co., 308 U S, 188;* and *U. S. v. Wayne Pump Co., 317 U. S. 200.)*

If the Court considers the *opinion* rendered by the District Court, although Appellee contends that Jurisdiction must be refused on the basis of the *Judgment* alone, resort to the *opinion* should also result in dismissal of the appeal.

The Court is referred to the following excerpts from Judge Davidson's opinion:

> "Now, I am not going to base this decision solely on this point because if there can be a definite decision of an issue or controversy between men without denouncing any act as unconstitutional it is better to put it on the other paragraph where one is present." (SJ at 12.)

"Coming now, then, to a third proposition: The government has not made a case against this defendant." (SJ at 13.)

"Has this man anything to do with commerce? Only in production. You have to extend the law to production to administer any *punishment* in this case." (SJ at 14.)

"*I consider the interpretation of the Act* given by the Department of Agriculture as being against public policy and as destructive of a great branch of our civilization, the agricultural branch." (SJ at 18.)

"I hardly think, however, that the court that sustained this law had before it the record that has been made here with its direful effect upon the public." (SJ at 9.)

It should be obvious, therefore, that the Appellant's remedy was *not* a *direct* appeal to this Court, but that any appeal should have been prosecuted to the United States Court of Appeals for the Fifth Circuit.

THE AGRICULTURAL ADJUSTMENT ACT OF 1938, AS AMENDED, IS SELF-DEFEATING SO FAR AS REDUCING SURPLUSES IS CONCERNED AND SHOULD BE DECLARED UNCONSTITUTIONAL IN ITS APPLICATION TO APPELLEE.

As a matter of plain common sense and justice, the said Act, enacted to avoid burdensome surpluses *(7 U. S. C. A. 1331)*, should not be used to penalize Appellee for growing 43 acres of wheat, when the Act had a built-in surplus of 36,419,355 acres in 1956. *7 U. S. C. A. 1333* provides that the national acreage allotment for wheat for any year shall be not less than fifty-five million (55,000,000) acres.

Secretary of Agriculture Ezra Taft Benson found the national acreage allotment as computed according to *7 U. S. C. A. 1333* to be 18,580,645 acres. He therefore was required to and did fix such allotment at fifty-five million acres (55,000,000) or 36,419,355 acres more than required to balance supply with need. F. R. Doc. 55-4023. As a matter of logic and fair play, it would seem logical, if Appellee is to be penalized for growing 43 acres of wheat, then the members of Congress should be penalized for their contribution of 36,419,355 acres of wheat to the swollen wheat surplus. Certainly, to enforce such penalty against the Appellee is contrary to the public policy of the United States and should be so declared by this Court. When a statute enacted by Congress cannot by its own terms accomplish its stated purpose *(7 U. S. C. A. 1331 and 1333)*, then this Court should declare such statute unconstitutional in such application.

WICKARD V. FILBURN, 317 U. S. 111, THE CASE CITED BY THIS COURT IN ITS SUMMARY REVERSAL, SHOULD BE OVERRULED AS GROSSLY UNSOUND.

The general scheme of the Agricultural Adjustment Act of 1938 was to regulate the volume of *wheat* moving in interstate commerce in order to avoid surpluses and shortages and consequent abnormal prices and obstructions to commerce. *317 U. S. at 115*. The Court assumed in that case that the consumption of farm grown wheat would reduce the demand for wheat on the open market as it would supply a need "which would otherwise be reflected

by purchases in the open market." *317 U. S. at 128.* This assumption was invalid for two reasons: (1) The farmer might not have the money to purchase wheat if he desired to purchase wheat in the open market, and (2) The farmer might well have elected to purchase any one of a number of other suitable feeds not controlled. The Act as it applies to instant case concerns only *wheat.* In the absence of evidence that Appellee would have purchased wheat if he had not grown and consumed wheat on the farm, this Court should not hold that his activities affected interstate commerce and should declare *Wickard v. Filburn,* supra, overruled in this respect.

Wickard v. Filburn, supra, if followed herein, would deprive Appellee of his property without due process of law guaranteed him by the Fifth Amendment. It certainly deprives him of his right to be let alone by the federal government, a right tacit in the Bill of Rights. The right to grow wheat and consume it on the farm where grown is an incident of the ownership of land and its products. In *U. S. v. Causby, 328 U. S. 256,* Mr. Justice Douglas wrote the majority opinion stating flights over plaintiff's land at low levels placed a "servitude" upon the land. He observed: "The owner's right to possess and exploit the land —that is to say, his beneficial ownership of it—would be destroyed." He further found that the fact that the "enjoyment and use of the land are not completely destroyed" was not controlling. In *Pennsylvania Coal Company v. Mahon, 260 U. S. 393,* Mr. Justice Holmes observed: "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes

as appropriating or destroying it." In his majority opinion, he further stated "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. * * * When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." These cases would seem to be authority that Appellee, if required to pay the penalty, has been deprived of due process of law.

If this Court sustains *Wickard v. Filburn*, supra, as applied to this case, then it has declared in effect that intrastate commerce is no more and that the Congress by definition [i.e. "Marketing", *7 U. S. C. A. §1301(b)(6)-(A)(B)*] can subject any activity to federal regulation by changing the conventional meanings of words. Just as the words "peace" and "democracy" are given special definitions by communist lexicographers, it may become necessary eventually to check the U. S. Code to see what new words have been debauched in order to extend the benevolent despotism of centralized power.

If the Court finally decides that Appellee is subject to penalty for growing wheat and consuming it on his own farm, it will have approved seizure of his property without due process and without compensation, all contrary to the Constitution. This Court will have made a substantial contribution to socialism in agriculture as exemplified in the

Agricultural Adjustment Act of 1938, as amended. Appellee urges this Court to reconsider its decision to reverse and to now declare that the right of citizens of this land to quiet enjoyment of their property cannot, under the Constitution, be overriden by Congressional acts which are ill-conceived and disasterous in their ultimate effects, but cleverly designed to bribe those whose approval is sought in annual referendums.

Appellee respectfully prays this Court to grant its Motion for Rehearing and to afford him a full hearing on the merits of the appeal including an opportunity for oral argument.

Respectfully submitted,

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